LIABILITY OF A GURANTOR.

The lawyer has frequent occasion to bring suit on a contract which is made by one person and guaranteed by another. The principal debtor is tardy, or is unable to pay; he has succeeded in tying up his property, or liens already bind it, so that the creditor can hope nothing from him or can only expect satisfaction at some indefinite period in the future when all prior claims are settled. He then looks to the guarantor, and the question what his rights may be against this collateral party becomes an important one. The guarantor, though usually a man of means, is always anxious to escape liability.

The guarantor's contract is an independent one of his own; he cannot, therefore, be joined in the same suit with his principal: *McMillan v. Bull's Head Bank* (Ind.), 2 Am. Rep. 323, 326; differing in this respect from a *surety*, who promises jointly with his principal, and from an endorser of negotiable paper, where a joint suit is allowed by statute.

A true guaranty must of course be in writing and signed by the party to be charged or his agent; for, under the Statute of Frauds, if merely verbal, no action can be brought upon it. It is, however, generally in form, a mere endorsement on the principal contract, and in such concise terms as to render it doubtful what liability is thereby assumed. It is a guaranty "of the debt" or "of the collection" or "of the goodness" of a debt, "of the solvency" of a maker, "of the faithful performance" of a contract, "of the punctual payment," and frequently simply "of the payment" of a debt.

A guaranty is both collateral and contingent; it is intended to secure the performance of another contract, the non-performance of which is a condition precedent to the guarantor's liability. But this is often not the only contingency. By some authorities the rule is stated broadly that before the guarantor can be called upon to make good his contract it must be shown that the principal is insolvent: 9 Am. & Eng. Encl. L. p. 68, and cases cited; *Campbell v. Sherman* (Penn.), 31 Am. St. R. 735; *Saint v. Wheeler & Wilson Mfg. Co.* (Ala.), 36 Am. St. Rep. 210; *Marberger v. Potts* (Penn.), 55 Am. Dec. 479.

In the cases above cited the courts were contrasting a surety and guaranty; they were not called upon to distinguish between the several classes of guaranties; they lay down a rule of construction appropri-

ate, perhaps, to guaranties pure and simple, but which will not serve as a definition of all guaranties, and which, for that reason, is apt to mislead. We find it stated that a surety is an insurer *of the debt*, and a guarantor only an insurer *of the solvency of the principal debtor;* that the guarantor can be called on to make good his contract only when due diligence has been used to collect from the principal, and when it has been shown by an exhaustion of legal remedies, or by his notorious insolvency, that the principal cannot be made to pay.

The contract, however, is not an anomalous one. In *Arents v. Commonwealth*, 18 Gratt. 770, in speaking of this distinction between a guaranty and surety, the court says: "But while this distinction exists, in general, between the contract of a surety and the contract of a guarantor, we must in every case look *to the terms of the guaranty*, and to the circumstances under which it was made, to ascertain by the rules of construction the character and extent of the undertaking. If it thus appears to have been the intention of the guarantor to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly."

An endorsement in blank on a non-negotiable instrument has no direct legal import; it may mean an assignment or a guaranty, or some other form of undertaking to be established by the evidence: *Welsh v. Ebersole*, 75 Va. 651. The true intention of the parties is always the subject of elucidation by proof, which may be by parol: *Hopkins v. Richardson*, 9 Gratt. 485. The letter of credit can be produced showing the terms on which the guarantor was to be bound, and these will determine his liability: *Wadsworth v. Allen*, 8 Gratt. 174.

Then it would seem that the extent of a guarantor's liability is a question of intention and it may be varied infinitely. There is, however, one clearly defined distinction between two classes of guaranties, recognized whenever presented to the courts, viz.: between a guaranty of *payment* and a guaranty of *collection*. When one guarantees that a debt can be "collected," he is safe until it is shown by an exhaustion of all remedies known to the law, or else by the principal's unquestioned insolvency, that the debt cannot be collected from the principal debtor. When, on the other hand, he guarantees simply the "payment" of a debt, his liability is absolute when the principal fails to pay at maturity. For authorities, see *Peck v. Frink* (Iowa), 74 Am. Dec. 384 and *ca. ci.* Here the terms of guaranty were: "I guarantee the col-

lection of the within at maturity ;" judgment in the lower court was reversed on the ground that diligence had not been used to collect from the principal debtor, the court basing its decision on the distinction above mentioned.

In *Craig v. Parkis* (N. Y.), 100 Am. Dec. 469, the defendant assigned a bond and mortgage and guaranteed *collection.* Grounding its opinion on same distinction, the court held that proper measures must first be promptly taken to collect from the principal and he be shown by those means insolvent.

McMurray v. Noyes (N. Y.), 28 Am. Rep. 180, contrasts guaranties of *payment* and of *collection,* respectively, and determines that the contract in that case belonged to the latter class, and was *therefore* conditional. The court thus clearly states the principle: "The fundamental distinction between a guaranty of payment and one of collection is, that in the first place the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defence to the guarantor; while in the second case, the undertaking is that if the demand cannot be collected by legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means, are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor."

The same distinction is drawn in *Cowles v. Pick* (Conn.), 3 Am. St. Rep. 44, and in 2 Dan'l Neg. Instr. sec. 1769.

As expressly holding that on a simple guaranty of *payment* the guarantor is responsible when his principal fails to pay according to his contract, without pursuit of the principal and without any question as to his insolvency, see: *Allen v. Rightmere* (N. Y.), 11 Am. Dec. 288; *Cobb v. Little* (Me.), 11 Am. Dec. 72; *Donley v. Camp* (Ala.), 58 Am. Dec. 274; *Huff v. Slife* (Neb.), 13 Am. St. Rep. 497; *Carroll County Savings Bank v. Strother* (S. C.), 6 S. E. Rep. 314; see, also, *Arents v. Commonwealth,* 18 Gratt. 750, 770.

There is an anomalous line of decisions in Pennsylvania holding that both guaranties of payment and of collection only warrant the good-

ness of a debt, but "these decisions are departures from the course of the common and commercial law": 2 Am. L. C. (H. & W.) 135.

This distinction between a guaranty of payment and of collection may seem at first glance a little strained, but it is a fair construction of the terms in question. We must consider *when* the guaranty is broken; a guaranty of "payment" or of "punctual payment" is a promise that the debt will be paid according to the principal contract; when the day of maturity, therefore, has passed without payment, the guarantor is at once liable without any resort to legal proceedings; when the debt is guaranteed "good" or "collectible," or the maker is guaranteed "solvent," the only method known to the law by which we may show that the debt is bad or that the maker is insolvent, is to promptly institute suit, and by its result ascertain the condition of the principal debtor.

The last statement must be taken with this qualification: that when the principal is notoriously insolvent, the law will not require a vain thing. If the creditor can show to the satisfaction of the court or jury that a suit against the principal would be unavailing, and would only result in delay and in the accumulation of costs, no legal proceeding against him is essential: 2 Dan'l Neg. Instr. (4th ed.), 1769a and cases cited; 2 Am. L. C. (H. & W.) p. 134, and 55; see analogous principle in 3 Min. Inst. 437, and in 2 Rob. Pr. 276.

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